IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1046370-D2
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Rapier L. NOGESS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1851

Rapier L. NOGESS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 21 January 1970, an Examiner of the United States Coast Guard at New York, N.Y., revoked Appellant's seaman's document upon finding him guilty of misconduct. The specifications found proved allege that while serving as a messman on board SS EXPORT COURIER under authority of the document above captioned, on or about 18 May 1969, Appellant wrongfully had in his possession narcotics paraphernalia and wrongfully failed to perform duties because of narcosis while the vessel was at sea.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of four witnesses, certain objects seized by a Customs officer, and a Customs laboratory report.

In defense, Appellant offered in evidence his own testimony and voyage records of EXPORT COURIER.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 23 January 1970. Appeal was timely filed and perfected on 29 January 1971.

FINDINGS OF FACT

On 18 May 1969, Appellant was serving as a messeman on board SS EXPORT COURIER and acting under authority of his document while the ship was at sea.

At about 0720 on that date Appellant was seen by the vessel's

purser-pharmacist's mate in the vicinity of the officer' salon grasping an iron rail which supported a ladder. When accosted by the purser, Appellant was at first incoherent but finally communicated that he was suffering hot and cold shakes and stomach pains.

The purser took Appellant to the hospital space for treatment. Suspecting influenza, the purser commenced treating Appellant for that illness and put Appellant to bed in the hospital. At about 1610, Appellant left the hospital space without having been released by the purser. He was found in his room and was ordered back to the hospital.

At about 1625, believing that Appellant might not have influenza since no fever had been detected, and that he might have in his possession mendicants for self-administration which might have caused the puzzling syndrome, the master and the purser searched Appellant's quarters the door to which was locked when they arrived.

In the pocket of a coat in Appellant's locker were found a syringe, a plunger, and a bottle cap. The discovery led the purser to a belief that Appellant's syndrome was one of narcotics-withdrawal. Examination of Appellant's body disclosed a bruise between the great and second toes of his left foot, a bruise similar to that caused by needle injection. At about 2000, Appellant told the purser that he had His last "pop" of heroin in New York, and he had since used methadone, which he had received "undercover" in New York. The supply of methadone, he said, had run out.

When EXPORT COURIER returned to New York the equipment found in the jacket was turned over to the Bureau of Customs. Laboratory analysis showed no trace of heroin in the syringe or plunger, but did reveal traces of heroin in the bottle cap.

The paraphernalia found by the master and purser-pharmacist mate is commonly associated with use of heroin, the bottle cap being utilized to prepare the drug for injection.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

(1) possession of narcotic paraphernalia is not wrongful;

(2) there was no evidence that Appellant failed to perform duties because of narcosis; and

(3) the order of revocation is too severe.

APPEARANCE: Abraham E. Freedman, New York, N.Y., by Martin L. Kats, Esq.

OPINION

I

I note first that there is a flaw in this record in that both memoranda and briefs submitted to the Examiner by Counsel and the Investigating Officer are referred to several times in the record of proceedings, but do not appear appended to the record. Normally, such a situation would require an order to perfect the record.

In the instant case I can hazard a surmise as to what happened. The Examiner who heard the case left the agency before the transcript was prepared. Until such time as the transcript of record was assembled for delivery to Appellant the record of testimony would be in the physical custody of the reporters while the briefs and memoranda would be in the physical custody of the examiner. It would appear that in the absence of the Examiner who heard the case, no one thought to assemble all the relevant document.

The fault, while unfortunate, is not reversible error. Appellant's counsel had the transcript in his possession for three months before he perfected the appeal, and therefore knew for that period what record was being submitted for consideration. Failure to object constitutes a waiver of the fault. Support of this view is further found in the fact that Appellant's final statement of grounds for appeal is conclusive of the issues which he seeks to raise, and any issue raised before the Examiner and resolved adversely to Appellant is not before me unless Appellant specifically places it in his grounds for appeal.

I do not imply here that a prospective appellant need formally preserve his "exceptions" before the examiner. An objection overruled or a motion denied may be brought forward on appeal without the ritual of immediate "exception" before the examiner as the common law rules required. To merit consideration, however, the issue must be submitted on appeal.

A minor point may be mentioned here, and that is that while the Examiner who heard the case was one W.E.L. the transcript showed a session of the hearing on 25 July 1969 as taking place before another examiner, one F.S.J.C. There is nothing in the

substance of the proceedings to indicate a substitution of another examiner for that one session, and there is in the substance of the record enough to support a conclusion that the Examiner who heard the case presided on 15 July 1969. Appellant has not complained, and I am of the opinion that the entry was clerical error not requiring further attention.

II

In dismissing a specification relative to possession of heroin aboard the vessel the Examiner mentioned the usability of the quantity found as a criterion of possession. Appellant's counsel had cited certain earlier Commandant's Decisions on Appeal (Nos. 745, 746) relative to marijuana "gleanings." If I were faced with the same fact situations today I am not at all sure that I would not overrule those earlier decisions which do not satisfactorily define the cut-off point of quantity of the substance found and leave too vague the amount or nature of the supporting evidence then found desirable to support a finding of "possession."

However, the rule of the cited decisions has never been thought of as applying to drugs like heroin. My ruling here cannot under present rules of procedure affect the Examiner's dismissal of the specification alleging possession of heroin, but I can hold here that the rationale of the Examiner's decision is rejected. I say now that possession of any identifiable quantity of heroin aboard a vessel is possession of heroin aboard the vessel whether the residue quantity is sufficient to provide a "shot" or not. Possession of heroin aboard ship is misconduct. While I cannot change the Examiner's dismissal of this particular specification my decision that possession of heroin was established in the instant case bears upon the Examiner's handling of the two specification found proved and upon Appellant's argument on appeal that the lack of showing of possession of heroin indicates that his failure to perform duties and his possession of narcotics paraphernalia cannot be held to be misconduct because possession of heroin was not established.

Despite the Examiner's carefully worded warning that the amount of heroin found in the bottle cap, while insufficient to prove "possession" of heroin, would be considered with respect to other matter, and despite my disagreement with the Examiner's disposition of the "possession of heroin" specification, I must point out here, with respect to Appellant's premise on appeal that he had no heroin aboard the vessel (thus tending to show that he

was not in a state of narcosis and that the paraphernalia found in his possession were not "narcotics" paraphernalia), that the Examiner's dismissal of the specification alleging that Appellant did have possession of heroin aboard the vessel does not amount to a finding that appellant did not possess heroin aboard the vessel. Even if an examiner found that a person charged did not perform an act which a specification alleged that he had done (e.g. desertion), the examiner's finding would not create a res judicata situation in a Federal court action over wages nor would it create an estoppel in a proceeding under R.S. 4450.

The Examiner's findings in the instant case that the evidence was insufficient to prove possession of heroin, such that the specification alleging possession of heroin should be dismissed, does not prohibit me from finding that Appellant did in fact possess heroin, if this fact does, as the Examiner apparently believed, tend to prove other specifications relative to connection with narcotics.

I reject here completely Appellant's argument that it was established that Appellant did not have heroin aboard the vessel and that thus any inference from possession of heroin must be rejected insofar as proof of another specification may be concerned.

III

A troublesome fact arises here in that the Examiner chose to call the specification as to failure to perform duties because of narcosis "inartistically" drawn in that the fault alleged, "failure to perform duties" was the "result of a far more serious offense." This stricture of the Examiner is easily disposed of.

There is in the record some evidence which would tend to prove that Appellant used heroin after he had signed the shipping agreement for EXPORT COURIER. It is not precluded, however, that his admitted use of heroin here occurred before his signing of the shipping agreement.

The Examiner's criticism of the specifications as "inartistically drawn" is not well founded.

The specification encompasses a situation in which the person may have used a narcotic before he became a member of the crew or a vessel so as to have rendered himself incapable of performing duties after he reported to the vessel for duty. In such a case, it is obvious that the use of narcotics (what the Examiner described as a "far more serious offense") was not within the purview of R.S. 4450 (46 U.S.C. 239) since the "far more serious

offense," that of using narcotics ashore before signing articles, is not misconduct under R.S. 4450 in any case. However, a failure to perform duties after reporting is misconduct.

It is obvious to me that the specification of which the Examiner complains, as "inartistically" drawn, was artfully drawn in that it covered the case in which the use of the narcotic could not be established as having occurred after Appellant had become subject to R.S. 4450. Whether the admitted use of heroin should have been charged under 46 U.S.C. 239b, assuming that it had occurred prior to Appellant's being bound to the ship by articles, I need not discuss.

The point I emphasize here is that an allegation that one failed to perform duties because of some "greater offense" is not inartfully drawn in a proceeding under R.S. 4450 when the "greater offense" did not occur within the cognizance of R.S. 4450.

IV

There may be no previous decision on appeal dealing with possession of narcotics paraphernalia, per se, aboard ship as misconduct under R.S. 4450. There may be no Federal law directly applicable to the possession of such paraphernalia aboard a ship at sea. It is true that State laws do not reach out to ships at sea so as to make crimes such acts as possession of narcotics paraphernalia.

I must hold here, however, that possession of such paraphernalia is misconduct within the general concept of "misconduct" under R.S. 4450, when conduct is viewed from the aspect of safety at sea. While the Examiner may have been wrong in finding that possession of heroin had not been proved because of the small quantity seized, he was eminently correct in finding that the presence of traces of heroin in the bottle cap indicated, as anyone familiar with the drug process would reasonably infer, that the paraphernalia were narcotics paraphernalia, especially in view of the fact that not attempt was made to establish that the other instrument were properly possessed for some legitimate, recognized medical purpose.

V

Appellant argues that the meaning of "narcosis" is so vague that the specification dealing with failure to perform duties "by reason of narcosis" is fatally defective. The examiner held that the testimony of the purser-pharmacist established that Appellant's condition at the time to his failure to perform duties on 18 May 1969 was the result of "narcosis." The testimony tended to prove,

and was accepted by the Examiner as proving, that Appellant was in a state in which he exhibited what are known as "withdrawal symptoms." The Quibble as to whether a state of "withdrawal" from narcotics is "narcosis" does not bother me.

There is a long history of opinion that, in the case of use of alcohol, it does not matter whether at the actual time of failure to perform duties a person was "drunk" or was merely incapacitated by reason of earlier drunkenness (a state of "hangover"). In either case it was the intoxication which was the cause of the failure to perform duties.

The same test applies here. Whatever the meaning of "narcosis," it is evident that Appellant's failure to perform duties on 18 May 1969 was the result of his prior use of narcotics, because the Examiner's findings is based on reliable, probative, and substantial evidence that Appellant's condition at the time of his failure to perform duties was the result of use of narcotics.

To dissuade the contentious I must point out a clear distinction between this case and that discussed in Robinson v California (1962), 370 U.S. 660.

I wish to make it clear here that Robinson v California, supra, has no bearing on the instant case. The specification in question does not allege only a "condition" of Appellant without evidence that the condition involved some other act or failure to act within the jurisdiction. It alleges an act, a violation of a contractual obligation, as misconduct as a result of a condition.

There is a vast difference between a finding that a "condition" violated a criminal law and a finding that a "condition" caused a breach of a seaman's obligation to perform duties.

VI

I have already given the opinion that unexplained possession of narcotics paraphernalia aboard ship is wrongful. I have also given the opinion that the record adequately supports the finding the Appellant's failure to perform duties on 18 May 1969 was because of his prior use of narcotics which rendered Appellant unfit to perform duties. I turn now to Appellant's claim that the order is excessive, assuming arguendo, that the specifications were properly found proved.

46 CFR 137.03-3, in the form effective at the time of this hearing, said, in paragraph (a):

" Whenever a charge of misconduct by virtue of the possession, use, sale, or association with narcotic drugs, is found proved, the examiner shall enter an order revoking all licenses, certificates and document held by such a person."

Despite the finding by the Examiner that possession of heroin at sea was not established, the two specifications found proved establish an "association with narcotic drugs" in the misconduct proved.

The order of revocation is therefore appropriate

ORDER

The order of the examiner dated at New York, N.Y., on 21 January 1970, is AFFIRMED.

C.R. BENDER
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, d.c, this 10th day of September 1971.

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